

Customs and Border Protection Civil Monetary Enforcement Process for EPA Emission Violations

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An under-reported element of the \$14.7 billion settlement between the United States government, Volkswagen, and related manufacturers regarding an alleged failure to comply with EPA-administered regulations governing diesel engine emissions is that a substantial portion of the settlement, though by no means the bulk of it, was to settle claims or potential claims by U.S. Customs and Border Protection (“Customs” or “CBP”). This paper provides an overview of the customs-related enforcement tools and the administrative enforcement processes that CBP can invoke in cases of non-compliance with EPA regulations. This discussion works from the assumption that all duties, taxes, and fees have been paid and that the compliance issues raised relate only to conformity with EPA requirements.

Executive Summary

Penalty	Maximum (Non-revenue)	Process	Judicial Review
19 USC § 1592			
Negligence	20% of dutiable value	Pre-penalty Notice Response Penalty Notice Petition to Mitigate/Cancel Penalty Claim	U.S. Court of International Trade
Gross Negligence	40% of dutiable value		
Fraud	Domestic value		
19 USC § 1595a(b)	Domestic value	Petition to Mitigate	U.S. District Court
Liquidated Damages	Value of merchandise, 3x value if restricted	Petition to Mitigate	U.S. Court of International Trade

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Penalty	Mitigating Factors	Aggravating Factors
19 USC § 1592	Contributory CBP error Extraordinary cooperation Immediate remedial action Inexperience of importer Prior good conduct	Obstruction of the investigation Prior violations Evidence of motive Failure to produce requested records
19 USC § 1595a(b)	Mistake of fact Prior good record Inexperience Extraordinary cooperation	Related criminal violation Repeated violations Evidence of motive or intent

Authority

Customs has statutory authority under 19 U.S.C. § 1592 to assess civil monetary penalties on importers, brokers, carriers, and any other “person” who violates the customs laws and regulations by making a material false statement or omission with respect to the entry or attempted entry of merchandise into the United States. Customs has separate statutory authority under 19 U.S.C. § 1595a(b) to assess a civil penalty against any person who assisted or was “concerned with” the importation of merchandise contrary to law. Separate from these penalty approaches, Customs can also assess liquidated damages for breaches of an importer’s bonds securing payment of duty and other obligations. Each mechanism is discussed below.

19 USC § 1592

- (a)(1) General rule. Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
 - (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
 - (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
 - (ii) any omission which is material, or
 - (B) may aid or abet any other person to violate subparagraph (A).

This statute is the most common means of assessing a penalty against an importer. A violation of § 1592 results when an importer or other person makes a material false statement or material omission to Customs with respect to the entry or attempted entry of merchandise. A statement or omission is material if it would tend to affect the treatment of the imported

merchandise with respect to admissibility, rate of duty, appraisal, marking, the presence of an unfair trade practice, or other condition enforced by Customs. 19 C.F.R. Pt. 171, App. B(B) (2009). In the context of this discussion, compliance with the Clean Air Act is a question of admissibility.

A material false statement or omission is only a violation of § 1592 if it is the result of negligence, gross negligence, or fraud. A clerical error, mistake of fact, or other error not amounting to negligence or fraud is not a violation of the statute. 19 U.S.C. § 1592(a)(2). However, in negligence cases, after CBP has identified the apparent violation, the burden is on the importer to show a lack of negligence or gross negligence. Id. at § 1592(e)(4). In fraud cases, the burden is on the government to show by clear and convincing evidence that the importer made the false statement or omission knowingly and with intent to deceive. Id. at § 1592(e)(2).

Penalties for Non-Revenue Violations, 19 U.S.C. § 1592(c)

- Fraud: Domestic value of the merchandise (i.e., entered value, plus duties, insurance, freight, and profit)
- Gross Negligence: 40% of the dutiable value (i.e., entered value)
- Negligence: 20% of the dutiable value (i.e., entered value)

A false statement or omission results from gross negligence where the act or acts (of commission or omission) by the defendant were done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute. United States v. Univar USA Inc., 355 F. Supp. 3d 1225, 1255 (CIT 2018), citing, 19 C.F.R. Pt. 171, App. B(C)(2).

A violation results from negligence if the importer failed to exercise “reasonable care.” The statute does not define reasonable care, but the legislative history to the Customs Modernization Act of 1994 provides guidance in the form of examples of activities that are evidence of reasonable care. According to the House Report,

In meeting the "reasonable care" standard, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a customs broker, a customs consultant, or a public accountant or an attorney; or using in-house employees such as counsel, a customs administrator, or if valuation is an issue, a corporate controller, who have experience and knowledge of customs laws, regulations and procedures

H. Rep. No. 103-361 at 120, 1993 U.S.C.C.A.N. 2670 (1993).

Process

Section 1592 creates a process through which CBP must perfect penalty claims. The initial step is a **Pre-Penalty Notice**. 19 U.S.C. § 1592(b)(1). This is formal notice to the importer or other party that CBP has reason to believe a violation has occurred. The Pre-Penalty Notice must provide the importer (or other person subject to the claim) the following information (with limited exceptions):

- describe the merchandise;
- set forth the details of the entry or introduction;
- specify all laws and regulations allegedly violated;
- disclose all the material facts which establish the alleged violation;
- state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;
- state the estimated loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
- inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

Experience indicates that the proposed penalty amount will usually be issued at the statutory maximum.

The importer may respond to the Pre-Penalty Notice in the form of a letter explaining why the circumstances do not constitute a violation and why the penalty should be cancelled. See, e.g., 19 C.F.R. Part 171, Subpart A (Application for Relief); 19 U.S.C. § 1592(b)(2). In response, CBP will either cancel the Pre-Penalty Notice or will issue a **Penalty Notice**, which is technically the “claim” required under 19 U.S.C. § 1592(b)(2). The Penalty Notice must also provide notice of any changes to the facts and conclusions stated in the Pre-Penalty Notice. Id.

Following the Penalty Notice, the importer may submit a **Petition to Mitigate or Cancel the Penalty**. 19 C.F.R. § 171.1. This is a letter in which the importer explains that the violation did not occur or, if it did occur, that the penalty amount should be mitigated. In addition to the Petition to Mitigate, the importer may request an oral presentation.

Customs has published **Mitigation Guidelines** it applies to penalty determinations. See, 19 C.F.R. Part 171, Appendix B, Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592.

Among the relevant mitigating factors are:

- Contributory Customs error
- Cooperation with the investigation beyond that normally expected of an individual subject to investigation
- Immediate remedial action
- Inexperience of the importer
- Prior good record of the importer

- Customs actual knowledge

Aggravating factors include:

- Obstructing an investigation
- Withholding evidence
- Providing misleading information concerning the violation
- Prior substantive violations of section 592 for which a final administrative finding of culpability has been made
- Evidence of a motive to evade a prohibition or restriction on the admissibility of the merchandise
- Failure to comply with a lawful demand for records or a Customs summons.

If Customs deems mitigation is appropriate, it applies the Guidelines it has established to set the penalty amount. Under the Guidelines, the mitigation ranges for non-revenue violations are:

- Fraud: 50% to 80% of dutiable value
- Gross: 25% to 40% dutiable value
- Negligence: 5% to 20% dutiable value

19 C.F.R. Part 171, Appendix B(F)(2)(Administrative Penalty Disposition). In no case can the mitigated penalty exceed the domestic value of the merchandise. Id.

If there is minimal or no loss of revenue to the United States and the violation is deemed to have “insignificant impact” on the enforcement of the laws of the United States, Customs may treat the violation as “technical” and assign a per-entry penalty without regard to the value of the merchandise. Id. at (c). The amount must be sufficient to deter future violations. Where there are no prior violations of the same kind, the technical violation may be resolved with a penalty of \$1,000 to \$2,000 per entry. For multiple and repeated violations, a fixed sum of \$2,000 to \$10,000 per entry may be appropriate. Id.

Note, the Mitigation Guidelines provide that where Customs is enforcing laws administered by other federal agencies (including EPA and NHTSA), Customs is to refer the matter to the other agency for a recommendation as to the resolution. Customs is required to give that recommendation “due consideration,” but is not required to follow it if the recommendation results in a disposition that is inconsistent with the mitigation guidelines. 19 C.F.R. Part 171, Appendix B(M)(Violations of Laws Administered by Other Federal Agencies).

After receiving Customs decision on the petition to mitigate the penalty, the importer has the right to file a **Supplemental Petition**. 19 C.F.R. § 171.61. This petition will be reviewed by the same office that made the original decision. If no additional relief is provided, the Supplemental Petition goes to a higher office for supplemental review. For penalties over \$10,000, the Regulations & Rulings office in Customs Headquarters, which includes the Penalties Branch, is responsible for the petition. 19 C.F.R. § 171.62.

The decision on the Supplemental Petition ends the administrative process. At that point, CBP has fully exhausted its administrative remedies. Customs can then assert a penalty claim for collection.

Judicial Review

Pursuant to 28 U.S.C. § 1582, the U.S. Court of International Trade has exclusive jurisdiction to decide a case brought by the United States to collect on a § 1592 penalty claim. The case is heard *de novo* with all questions of law and fact to be decided by the Court based on the record made before it, not the agency record. 19 U.S.C. § 1592(e)(1); 28 U.S.C. § 2640(a)(6). Questions of fact may be presented to a jury, but that has rarely happened. See, CIT Rule 38(a) (“The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to parties inviolate.”)

In a CIT penalty case, the level of culpability dictates the assignment of the burden of proof. In a fraud case, the government has the burden to establish the alleged violation by clear and convincing evidence. 19 U.S.C. § 1592(e)(2). In a gross negligence case, the United States has the burden of proving all the elements of the alleged violation. *Id.* at § 1592(e)(3). In a negligence case, the United States must prove the material false statement or omission. Once it has done so, the burden shifts to the defendant to prove that the violation was not the result of negligence. *Id.* at § 1592(e)(4).

19 U.S.C. § 1595a(b)

Under Section 1595a(b),

Every person who directs, assists financially or otherwise, or is in any way concerned in any unlawful activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

This statute gives the government the authority to impose a monetary penalty on “every person” who is “concerned in any way” with the introduction into the United States of merchandise where the importation is contrary to law. This provision is generally, though not necessarily, used in conjunction with the seizure and forfeiture of inadmissible merchandise. CBP, Guidelines for Remission of Forfeitures and Mitigation of Penalties for Importations Contrary to Law, 2 (2019); *See, e.g., United States v. Wing Leong*, 287 F.2d 849, 851 (7th Cir. 1961) (seizure is an *in rem* action while a monetary penalty is a separate *in personam* action). Seizure is not a pre-requisite to a penalty under this provision. CBP, Guidelines for Remission of Forfeitures and Mitigation of Penalties for Importations Contrary to Law, 2 (2019). The provision is applicable to the unlawful importation or introduction of any prohibited or restricted merchandise. “Restricted merchandise” is admissible only when the appropriate documentation is presented and the article complies with the legal requirements for admission. HQ H239257 (Jul. 25, 2013) (“Prohibited merchandise is that which cannot be lawfully imported 'into the United States

under any circumstances. Restricted merchandise is that which may be altered to become conforming with U.S. requirements and then may be lawfully entered.”).

Penalties

The penalty under § 1595a(b) is fixed by statute at the value of the merchandise. Domestic value is the entered value plus duties, taxes, fees, transportation and related expenses plus a profit. United States v. Pan Pacific Textile Group, Inc., 30 CIT 139–40 & n. 2 (2006)(discussing definition of “domestic value.”). Despite the statutory penalty, United States v. Gordon, 10 CIT 292, 300, 634 F. Supp. 409, 417 (1986)(“there is no provision for imposition of a lesser penalty by the court or jury), CBP has (wisely) issued mitigation guidelines for monetary penalties assessed under § 1595a(b), discussed below.

Process

Unlike § 1592, there is no detailed process for the imposition of a penalty under § 1595a. After notice of a penalty, the importer may file a petition for cancelation or mitigation of the penalty. 19 U.S.C. § 1618. For penalties over \$100,000, the petition is reviewed by Regulations & Rulings at CBP Headquarters.

The mitigating factors for a penalty under § 1595a(b) include:

- Prior good record
- Clear documentation of remedial measures to prevent future violations
- Inexperience importing
- Extraordinary cooperation with CBP

Aggravating factors include:

- Related criminal violations
- Repetitive violations
- Evidence of intentional importations contrary to law

CBP, Guidelines for Remission of Forfeitures and Mitigation of Penalties for Importations Contrary to Law, 5, 6 (2019).

Judicial Review

Rather than fall within the exclusive jurisdiction of the Court of International Trade, § 1595a(b) penalties are subject to district court review, typically as part of a related forfeiture case. See, 28 U.S.C. 1355 (1988)(granting district courts jurisdiction over actions by the United States to recover a penalty except those brought in the Court of International Trade under 28 U.S.C. § 1582, which does not include § 1595a(b) claims.) Because the judge does not have discretion as to the amount of the monetary penalty, this section has been held to be “quasi-

criminal in nature,” permitting defendants to invoke their rights against self-incrimination. See, United States v. Gordon, 10 CIT 292, 300, 634 F. Supp. 409, 418 (CIT 1986)(as part of a 1592 civil penalty action).

Liquidated Damages

Claims for liquidated damages are contractual in nature and are subject to the terms of the relevant bond. In the case of imported merchandise that allegedly fails to comply with EPA regulations, such as a non-compliant vehicle or engine, the most relevant bond condition is likely to be the requirement to comply with a lawful order to redeliver merchandise under 19 C.F.R. § 113.62(d). Often, by the time the importer receives a Notice to Redeliver, the merchandise has been consumed or sold and is not available for redeliver. In those cases, CBP will often claim a breach of the bond and seek to collect liquidated damages. See, e.g., ICCS USA Corp. v. United States, 357 F. Supp. 3d 1314 (CIT 2018)(liquidated damages claim following importer failure to redeliver for country of origin marking).

The consequences of breaching the bond obligation are set out at 19 C.F.R. § 113.62(n), which states:

If the principal defaults on agreements in this condition other than conditions in paragraphs (a), (g), (i), (j), (k)(2), (l), or (m) of this section the obligors agree to pay liquidated damages equal to the value of the merchandise involved in the default, or three times the value of the merchandise involved in the default if the merchandise is restricted or prohibited merchandise or alcoholic beverages, or such other amount as may be authorized by law or regulation.

The administrative process for imposing liquidated damages depends on the circumstance. The Mitigation Guidelines sets out several alternatives for resolving claims related to the failure to redeliver merchandise. Relevant to this discussion, the options include:

1. If the merchandise is not redelivered for any reason not enumerated above or is redelivered outside the time period prescribed for redelivery in the notice of redelivery, the claim may be canceled upon payment of between 1 and 10 percent of the value of the merchandise depending upon the presence of aggravating or mitigating factors.
2. For subsequent violations, cancel the claim upon payment of an amount between 10 and 50 percent of the value of the merchandise, depending upon the presence of aggravating or mitigating factors.

....

4. If exportation or destruction (when ordered) never occurs, grant no relief.

CBP, Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages, 213 (Feb. 2004).

Depending on the circumstances, Customs has several options for resolving claims for liquidated damages. Those options include:

1. Where all facts are known and the issue is easily resolved, the Port can issue a Notice of Liquidated Damages with a proposed amount stated. This usually applies to technical violations such as the late filing of an entry or the failure to present a document.
2. Where the facts are not known, liquidated damages cases track the petition and supplemental petition process used in § 1592 cases. For liquidated damages under \$200,000, the Fines, Penalties, and Forfeiture Officer at the Port will make the determination. For cases with larger amount in controversy, the decision is made by OR&R.
3. If the liquidated damages remain unpaid, the government can bring a collection case in the Court of International Trade.
4. Liquidated Damages cases can be settled through the offer in compromise process.

CBP, What Every Member of the Trade Community Should Know About: Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages, 41-43 (2004).

Settlement Opportunities

The primary mechanism for settling customs penalty cases is the Offer in Compromise (“OIC”). An OIC can be submitted at any point in a dispute with Customs. CBP, What Every Member of the Trade Community Should Know About: Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages, 27 (2004).

The OIC must include a check depositing the amount of the proposed compromise. Customs will deposit the funds while it considers the offer. If the offer is rejected, CBP refunds the amount.

There are only two factors Customs considers in this context:

- The importer’s ability to pay
- Litigation risks to the government

Id. In practice, an Offer in Compromise can be coupled with an argument that the violation be treated as “technical” and the penalty be calculated on a per-entry basis.

Litigation risks to the United States generally arise where the case presents a legal issue that might affect broader enforcement policies or other pending cases. The cost and time of litigation is generally not a significant risk to the government.

Application to EPA Violations

Legal Opportunities

Assuming some level of liability for an EPA violation that relates to imported vehicles, engines or related equipment an importer can develop a strategy to address Customs' investigation and the expected penalty and liquidated damages claims.

Offer in Compromise: The most immediate mechanism through which an importer can engage CBP in settlement discussions is an OIC. This will require a determination of the potential civil liability and the identification of litigation risks for the government. The possible risks to Customs include an argument that its penalty is duplicative of the EPA's own enforcement process. Under the fifth amendment, no person may be twice put in jeopardy for the same offense. This has been held applicable in unusual situations in which the civil penalty is deemed to be punitive in purpose or effect rather than remedial and, therefore, treated as a criminal or quasi-criminal fine. In that case, two criminal penalties based on the same behavior for which the same facts must be proved would arguably violate the double jeopardy clause. See, e.g., Cole v. Department of Agriculture, 133 F.3d 803 (11th Cir. 1998)(civil penalty for violation of tobacco regulations not double jeopardy after criminal acquittal).

This is a difficult argument because the elements of the customs violation are different than the underlying EPA violation. The customs violation relates to the representations made to CBP at the time of entry or to a breach of the bond condition. That is separate from whether the vehicle, engine, or other equipment complies with the relevant EPA and NHTSA regulations. Nevertheless, the issue is worth raising if the amount or nature of the penalty appears punitive

Prior Disclosure: An importer that identifies a violation of § 1592 can, under certain circumstances, voluntarily disclose the violation to Customs and preclude a civil penalty in excess of the interest owed on unpaid duties, taxes, and fees. An importer can only make a voluntary prior disclosure before it has notice of a CBP investigation into the same violation. Furthermore, the scope of a prior disclosure is limited to material false statements or omissions subject to a penalty under 19 U.S.C. § 1592. There is no explicit prior disclosure provision for penalties assessed under § 1595a(b) or for liquidated damages. Despite that, a "disclosure" may be useful as evidence of extraordinary cooperation when arguing for mitigation.

Technical Violation: As discussed above, CBP can treat repeated non-revenue violations as "technical," and assess a penalty on a per-entry basis. This can be a useful and expedient way for CBP to quickly resolve penalty cases. Customs will typically deny "technical violation" treatment in cases where it deems the underlying violation to be significant. Matters of public health and safety and unfair trade practices are often not treated as technical violations.

Whatever the approach to the customs violations, it is important that communications with the EPA, most likely through specialized environmental counsel, be coordinated with counsel responsible for the customs aspects of the matter. Particularly in the case of a settlement or where criminal violations may be a concern, a possible EPA strategy may be to present the

violation as a technical or engineering mistake that was not intended to produce a non-compliant vehicle or engine. Care must be taken to ensure that the EPA defense does not result in creating admissions indicating negligence in reporting to Customs. At the same time, customs counsel must keep in mind that federal penalties for violations of the Clean Air Act and state penalties under similar laws can rapidly eclipse the penalties CBP can impose. Thus, the leading driver of the overall strategy is likely to be the EPA enforcement side even where the customs law penalties can be significant.